

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLOW WIND ORGANIC FARMS, INC.,
et al.,

Plaintiffs,

v.

KENYON ZERO STORAGE, INC.,

Defendant.

No. CV-04-155-FVS

ORDER

THIS MATTER came before the Court on October 14, 2005, based upon "Defendant Kenyon's First Motion for Partial Summary Judgment Dismissing Certain Claims" and "Plaintiffs' Objection to Oral Argument by Lane Powell." The defendant was represented by Joseph E. Lynam; the plaintiffs by C. Matthew Andersen.

BACKGROUND

The Court has reviewed the evidence that has been submitted by the parties. This order refers only to those parts of the record that are implicated by "Defendant Kenyon's First Motion for Partial Summary Judgment Dismissing Certain Claims."

ALLEGED PROMISE TO GUARANTEE

Willow Wind Organic Farms, Inc., Grandview Frozen Foods, Inc., Roy Steven Walser and Margaret Walser (hereinafter "the plaintiffs") allege that Kenyon Zero Storage, Inc., orally promised to guarantee a line of credit. Kenyon argues the promise is unenforceable because, under the State of Washington's statute of frauds, "every special promise to answer for the debt . . . of another person" must be

1 reduced to writing. RCW 19.36.010. This argument is unpersuasive.
2 Commentators agree that "[a] contract to discharge a duty owed by the
3 promisee to a third person is not within the Statute of Frauds as a
4 contract to answer for the duty of another." Restatement (Second) of
5 Contracts § 123 (1981). See also 9 Samuel Williston & Richard A.
6 Lord, *A Treatise on the Law of Contracts* § 22:3, at 233 (4th ed.1999)
7 ("the Statute of Frauds has been confined to promises made to the
8 creditor"); 4 Caroline N. Brown, *Corbin on Contracts* § 15.2 (Joseph
9 M. Perillo ed., Revised ed.1997) ("If the promise to pay or otherwise
10 answer for another's debt or default to a third person is made to the
11 debtor rather than to the creditor, it is not within the statute.")
12 This principle was endorsed by the Supreme Court of the State of
13 Washington in an early decision. *Handsaker v. Pedersen*, 71 Wash.
14 218, 224, 128 P. 230 (1912) (an oral promise by one party to a debt
15 to another party to the debt to hold the other party harmless did not
16 constitute a promise to pay the debt of another). In view of the
17 preceding authorities, it is significant that it was to Mr. Walser
18 (as opposed to, say, a bank) that Kenyon allegedly made the promise
19 to guarantee a line of credit. Since Kenyon allegedly contracted
20 with Mr. Walser to guarantee an obligation that Walser might one day
21 owe to a creditor, the alleged contract between Kenyon and Walser is
22 not within the statute of frauds.

23 **NATURE OF PLAINTIFFS' SEVENTH CLAIM FOR RELIEF**

24 The plaintiffs' Seventh Claim for Relief is entitled
25 "Intentional/Negligent Misrepresentation." Paragraph 10.2 alleges,
26 "During the course of the parties' business relationship, Kenyon made
27 numerous representations regarding its intention to participate, on
28 an equity basis, in Willow Wind and of its intention to assist Willow
29 Wind, Grandview, and Walser in obtaining adequate operating funding."
30 (Complaint, at 24.) During May or June of 2004, Kenyon served a
31 separate set of interrogatories upon each of the plaintiffs. Each

1 set of interrogatories appears to be the same. The set of
2 interrogatories that Kenyon served upon Willow Wind is entitled
3 "Defendant's First Interrogatories to Plaintiff Willow Wind Organic
4 Farms, Inc." Interrogatory No. 3 asked Willow Wind to identify all
5 of the representations upon which it is relying to establish that
6 Kenyon promised to provide equity funding. Willow Wind responded
7 during August of 2004. The only representations explicitly
8 identified by Willow Wind are ones that allegedly were made at the
9 January dinner and the January board meeting. Although Willow Wind's
10 answer goes on to describe statements that allegedly were made after
11 the January board meeting, these cannot fairly be characterized as
12 representations regarding equity funding. Given the plaintiffs'
13 response to Interrogatory No. 3, Kenyon reasonably assumed the
14 plaintiffs' Seventh Claim for Relief is a claim for intentional
misrepresentation and that it is based upon promises which Kenyon's
representatives allegedly made during January of 2003.

15 A claim of intentional misrepresentation requires clear, cogent
16 and convincing proof that the defendant misrepresented an existing
17 material fact. *See Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457
18 P.2d 603 (1969). Typically, a person's promise to do something in
19 the future cannot be either true or false at the time the promise is
20 made. *Shook v. Scott*, 56 Wn.2d 351, 356, 353 P.2d 431 (1960)
21 (internal punctuation and citations omitted). Consequently, as a
22 general rule, a plaintiff cannot bring a claim of intentional
23 misrepresentation based upon the defendant's failure to perform some
24 act the defendant previously promised to perform. However, there is
25 an exception to this rule. A person who makes a promise with no
26 intention of keeping it is said to be misrepresenting an existing
fact -- i.e., his state of mind -- and, thus, his misrepresentation
will give rise to a claim for fraud. *Beckendorf*, 76 Wn.2d at 462-63.
See also Markov v. ABC Transfer & Storage Co., 76 Wn.2d 388, 395, 457

1 P.2d 535 (1969) ("if a promise is made for the purpose of deceiving
2 and with no intention to perform, it constitutes such fraud as will
3 support an action for deceit").

4 Believing, as Kenyon did, that the plaintiffs' Seventh Claim for
5 Relief is a claim for intentional misrepresentation, Kenyon moved for
6 partial summary judgment on August 26, 2005. According to Kenyon,
7 the Court should dismiss the plaintiffs' Seventh Claim because,
8 during Mr. Walsers' deposition, the plaintiffs stipulated that they
9 lack evidence that Kenyon never intended to perform the promises
Kenyon allegedly made during January of 2003.

10 The plaintiffs seemed to accept Kenyon's characterization of
11 their Seventh Claim for Relief; viz., that the plaintiffs are
12 alleging intentional misrepresentation. Moreover, they seemed to
13 acknowledge that they bear the burden of proving Kenyon never had any
14 intention of performing the promises its representatives allegedly
15 made. In view of the plaintiffs' response to Kenyon's motion, it
16 appeared they were resisting summary judgment on essentially two
17 grounds. For one thing, they denied stipulating they lack evidence
18 that Kenyon never intended to perform the disputed promises. For
19 another thing, they said Kenyon had misstated the factual basis of
20 the claim. They said they were not relying exclusively upon the
January representations; they said they also were relying upon the
representations leading up to the "bridge" loan.

21 At oral argument, the plaintiffs' interpretation of their
22 Seventh Claim for Relief appeared to change significantly. Instead
23 of being a claim for intentional misrepresentation, said the
24 plaintiffs, the Seventh Claim for Relief actually is a claim for
25 negligent misrepresentation. Furthermore, instead of being a claim
26 that is based upon representations allegedly made during January of
2003, the claim is based upon a representation that allegedly was
made during April or May. According to the plaintiffs, Kenyon's

1 representatives told them, "When the ProFac litigation goes away, we
2 will invest in Willow Wind."

3 Kenyon strenuously objects to the plaintiffs' apparently new
4 interpretation of their Seventh Claim for Relief. Kenyon argues that
5 the plaintiffs are bound by their answer to Interrogatory No. 3. At
6 this juncture, it is unclear whether Kenyon is correct. Preliminary
7 research suggests that a party ordinarily is not bound by its answer
8 to an interrogatory. See *Donovan v. Crisostomo*, 689 F.2d 869, 875
9 (9th Cir.1982); *Victory Carriers, Inc. v. Stockton Stevedoring Co.*,
10 388 F.2d 955, 959 (9th Cir. 1968); 8A Charles A. Wright, Arthur R.
11 Miller & Richard Marcus, *Federal Practice and Procedure* § 2181 (2nd
12 Ed.1994). This does not mean the plaintiffs are free to ignore the
13 answer they gave to Interrogatory No. 3. A party has a duty to
14 supplement its discovery responses. Fed.R.Civ.P. 26(e)(2). To date,
the plaintiffs have not supplemented their answer to Interrogatory
No. 3.

15 Where does this leave matters? As things now stand, Kenyon is
16 moving to dismiss a claim the plaintiffs deny they are asserting.
17 Furthermore, neither side has discussed the claim the plaintiffs
18 insist they are asserting. This places everyone in an awkward
19 position. The Court could rule that the plaintiffs are bound by the
20 answer they provided to Interrogatory No. 3. In that case, the Court
21 would dismiss the plaintiffs' Seventh Claim for Relief on the ground
22 they have abandoned any claim for intentional misrepresentation and
23 it is too late to bring a claim for negligent misrepresentation.
24 Alternatively, the Court could allow the plaintiffs to supplement
25 their answer to Interrogatory No. 3 (a thing which they have not
26 sought leave to do). This would dramatically change the scope of the
plaintiffs' Seventh Claim for Relief and would cause prejudice to
Kenyon unless the Court extends both the discovery cutoff and the
dispositive motion deadline.

1 As it turns out, Kenyon is seeking a continuance of the trial
2 date. Given the Court's schedule, the continuance is likely to be
3 significant. Consequently, the Court is inclined to grant Kenyon's
4 request, and, at the same time, extend both the discovery cutoff and
5 the dispositive motion deadline. This would allow time for the
6 following: the plaintiffs to supplement their discovery responses;
7 Kenyon to arrange for representation by new counsel; and both sides
8 to complete discovery and file such dispositive motions as they deem
appropriate.

9 **IT IS HEREBY ORDERED:**

10 1. "Defendant Kenyon's First Motion for Partial Summary Judgment
11 Dismissing Certain Claims" (Ct. Rec. 56) is denied.

12 2. "Plaintiffs' Objection to Oral Argument by Lane Powell" (Ct.
13 Rec. 79) is denied. Provided, Kenyon must promptly arrange for
representation by new counsel.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 18th day of October, 2005.

17 s/ Fred Van Sickle
18 Fred Van Sickle
United States District Judge